LAW AND MORALS.[1]

PRIMITIVE law regards the word and the act of the individual; it searches not his heart. "The thought of man shall not be tried," said Chief Justice Brian, one of the best of the medieval lawyers, "for the devil himself knoweth not the thought of man."[2]

As a consequence early law is formal and unmoral. Are these adjectives properly to be applied to the English common law at any time within the period covered by the reports of litigated cases? To answer this question let us consider, first, the rule of liability for damage caused to one person by the act of another. Not quite six hundred years ago an action of trespass was brought in the King's Bench for a battery. The jury found that the plaintiff was beaten, but that this was because of his assailing the defendant who had acted purely in self-defense, and that the action was brought out of malice. It was nevertheless adjudged that the plaintiff should recover his damages according to the jury's verdict, and that the defendant should go to prison. The defendant had committed the act of battery; therefore he must make reparation. He was not permitted to justify his act as done in protecting himself from the attack of the plaintiff. That attack rendered the plaintiff liable to a cross action, but did not take away his own action.

The case we have just considered was an action for compensation for a tort. Suppose, however, that the defendant, instead of merely injuring his assailant, had killed him in self-defense, using no unnecessary force. Did the early English law so completely ignore the moral quality of the act of killing in self-defense as to make it a crime? Strictly speaking, yes. An official reporter of the time of Edward III[3] and Lord Coke[4] were doubtless in error in stating that prior to 1267 a man "was hanged in such a case just as if he had acted feloniously." But such killing was not jus-

[1] From an address delivered at the seventy-fifth anniversary of the Cincinnati Law School, and reprinted by permission of the University of Cincinnati Record.

[2] Y. B. 7 Ed. IV, f. 2, pl. 2.

[3] Y. B. 21 Ed. III, f 17, pl. 22.

[4] Coke, Second Inst., 148.

tifiable homicide. The party indicted was not entitled to an acquittal by the jury. He was sent back to prison, and must trust to the king's mercy for a pardon. Furthermore, although he obtained the pardon, he forfeited his goods for the crime. But the moral sense of the community could not tolerate indefinitely the idea that a blameless self-defender was a criminal, or that he should have to make compensation to his culpable assailant. By 1400 self-defense had become a bar to an action for a battery. Pardons for killing in self-defense became a matter of course; ultimately the jury was allowed to give a verdict of not guilty in such cases, and the practice of forfeiting the goods of the defendant died out.

Let us test the rule of liability by another class of cases. One person may have injured another without fault on either side, by a pure accident. The case against the actor in such a case is obviously stronger than against one who inflicts damage in self-defense. Accordingly we are prepared for this language of the Statute of Gloucester, 6 Ed. I, c. 9, 1278: "If one kills another in defending himself, or by misadventure, he shall be held liable, but the judge shall inform the king, and the king will pardon him, if he pleases."[1] *A fortiori* the actor was bound to make compensation to the victim of the accident. The criminal liability disappeared comparatively early, as in the case of killing in self-defense. But the doctrine of civil liability for accidental damage caused by a morally innocent actor was very persistent. It was stated forcibly by an eminent judge in 1681 as follows: "In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering. If a man shoot at butts and hurt a man unawares an action lies. . . . If a man assault me and I lift up my staff to defend myself and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason is because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there '*Actus non facit reum, nisi mens sit rea.*'"[2] As pointed out by Sir Frederick Pollock, in his treatise on torts,[3] a similar opinion was expressed subsequently by Blackstone, Erskine, Mr. Justice Grose, and as late as 1868 by Lord Cranworth. Erskine's statement goes very far: "If a man rising in his sleep walks into a china shop and breaks everything about him, his being asleep is a complete an-

[1] See also Y. B. 2 Hen. IV, f. 18, pl. 6, per Thirning, C. J.

[2] Lambert *v.* Bessey, T. Ray. 421.

[3] 8 ed., 142.

swer to an *indictment* for trespass, but he must answer in an *action* for everything he has broken." There were, however, from time to time certain intimations from the judges that in the absence of negligence, an unintentional injury to another would not render the actor liable, and finally in 1891 a case was brought in the Queen's Bench[1] which required the court to decide whether the old rule of strict liability was still in force or must give way to a rule of liability based upon moral culpability. The defendant, one of a hunting party, fired at a pheasant. The shot, glancing from the bough of an oak tree, penetrated the eye of the plaintiff, destroying his sight. The jury found that the defendant had not acted negligently, and the court decided that the defendant was not liable. The same result was reached in Massachusetts forty years earlier,[2] and this precedent has been followed in other states.

So that today we may say that the old law has been radically transformed. The early law asked simply, "Did the defendant do the physical act which damaged the plaintiff?" The law of today, except in certain cases based upon public policy, asks the further question, "Was the act blameworthy?" The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril. Nor is the modern ethical doctrine applied even now to all cases logically within its scope. Under this doctrine a lunatic unable to appreciate the nature or consequences of his act ought not to be responsible for the damage he has inflicted upon another. The lunatic homicide ceased to forfeit his goods or to require the king's pardon centuries ago. But there is no English decision that a lunatic need not make reparation to one injured by his act. There is, to be sure, no English decision to the contrary; but there are several *dicta* against the lunatic, and an unreasoning respect for these *dicta* has led to several regrettable decisions in this country and in the British Colonies. These decisions must be regarded as survivals of the ancient rule that where a loss must be borne by one of two innocent persons, it shall be borne by him who acted. Inasmuch as nearly all the English writers upon torts, and many of the American writers also, express the opinion that the lunatic, not being culpable, should not be held responsible, it is not unreasonable to anticipate that the English

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[1] Stanley *v.* Powell, [1891] 1 Q. B. 86.

[2] Brown *v.* Kendall, 6 Cush. (Mass.) 292.

courts and the American courts, not already committed to the contrary doctrine, will sooner or later apply to the lunatic the ethical principle of no liability without fault. The continental law upon this point is instructive. By the early French and German law the lunatic was liable as in England for damage that he caused to another. In France today the lunatic is absolutely exempt from liability. The new German Code has a general provision to the same effect, but this code, resembling in this respect the law of Switzerland and Portugal, makes this qualification of the rule of non-liability. If compensation cannot be obtained from the person in charge of the lunatic, the court may order the lunatic to pay such compensation as seems equitable under the circumstances, having regard especially to the relative pecuniary situation of the parties, and so that the lunatic shall not in any event be deprived of the means of maintaining himself in accordance with his station in life, or of complying with his legal duties as to the maintenance of others. This compulsory contribution by the rich lunatic to his poor victim with freedom from liability in other cases may well prove to give the best practical results.

We have seen how in the law of crimes and torts the ethical quality of the defendant's act has become the measure of his liability instead of the mere physical act regardless of the motive or fault of the actor. The history of the law of contracts exhibits a similar transformation in the legal significance of the written or spoken word. By the early law, in the absence of the formal word, there was no liability, however repugnant to justice the result might be. On the other hand, if the formal word was given, then the giver was bound, however unrighteous, by reason of the circumstances under which he gave it, it might be to hold him to his promise. The persistence of this unmoral doctrine in the English law is most surprising. As late as 1606 the plaintiff brought an action alleging that the defendant, a goldsmith, sold him a stone affirming it to be a bezoar stone, whereas it was not such a stone. The court gave judgment against the plaintiff on the ground "that the bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action."[1] The buyer reasonably supposed that he was getting a valuable jewel for his hundred pounds, but he must pocket his loss, since the goldsmith did not use the magic

[1] Chandler *v.* Lopus, Dy., 75 a, n. 23; Cro. Jac. 4.

words "I warrant" or "I undertake." Today, of course, the sale of a chattel as being of a particular description implies a warranty or undertaking to that effect. But the notion of implying a promise from the conduct of the party was altogether foreign to the mental operations of the medieval lawyer. For this reason the buyer took the risk of the seller's not being the owner of the property sold unless the seller expressly warranted the title. In the case of goods the mere selling as owner is today a warranty of title, but the rules of real property not being readily changed the archaic law still survives in the case of conveyances of land, the grantee being without remedy if there is no covenant of title in the deed. The inability to imply a promise from the conduct of the parties explains this remark of Chief Justice Brian: "If I bring cloth to a tailor to have a cloak made, if the price is not ascertained beforehand that I shall pay for the work, he shall not have an action against me."[1] Similarly in the reign of Elizabeth a gentleman of quality put up at an inn with his servants and horses. But no price was agreed upon for his accommodations. The gentleman declining to pay, the innkeeper could obtain no relief at law.[2] Neither the customer nor the guest had made an express promise to pay. The law could not continue in this state. It was shocking to the moral sense of the community that a man should not pay for what was given him upon the mutual understanding that it should be paid for. Accordingly the judges at length realized and declared that the act of employing a workman, ordering goods, or putting up at an inn meant, without more, an undertaking to make reasonable compensation.

There is a certain analogy between the ethical development of the law and that of the individual. As early law is formal and unmoral, so the child or youth is wont to be technical at the expense of fairness. This was brought home to me once by an experience with one of my sons, then about twelve years old. I asked him one day about his plans for the afternoon, and he told me he was to play tennis with his friend John. In the evening, when asked if he had had a good afternoon with John, he said, "Oh, I have n't been with him. I thought I would rather play with Willie." "But did n't John expect you?" "Yes, I suppose he did." "Was it quite right, after you had led him to expect you, to disappoint him?" "Oh, but I did n't promise him that I would come." Remembering Chief Justice Brian, I was lenient with the boy.

[1] Y. B. 12 Edw. IV, f. 9, pl. 22.

[2] Young *v.* Ashburnham, 3 Leon. 161.

The significance of the written word in the early law is illustrated by the rule that one who claimed the benefit of a promise under seal must produce it in court. The promise under seal was regarded not as evidence of the contract, but as the contract itself. Accordingly, the loss or destruction of the instrument would logically mean the loss of all the promisee's rights against the promisor. And such was the law: "When the action is upon a specialty, if the specialty is lost the whole action is lost," is the language of a Year Book judge.[1] The injustice of allowing the obligor to profit at the expense of the obligee by the mere accident of the loss of the obligation is obvious. But this ethical consideration was irrelevant in a court of common law. It did finally prevail in Chancery, but not until the seventeenth century.[2] A century later the common law judges, by judicial legislation and against the judgment of Lord Eldon, allowed the obligee to recover upon secondary evidence of a lost specialty.

The formal and unmoral attitude of the common law in dealing with contracts under seal appears most conspicuously in the treatment of defenses based upon the conduct of the obligee. As the obligee, as we have seen, who could not produce the specialty, was powerless at common law against the obligor, who unconscionably refused to fulfill his promise, so the obligor who had formally executed the instrument was at common law helpless against an obligee who had the specialty, no matter how reprehensible his conduct in seeking to enforce it. In 1835, in an English case, the defendant's defense to an action upon a bond, that it had been obtained from him by fraudulent representations, was not allowed, Lord Abinger saying: "You may perhaps be relieved in equity, but in a court of law it has always been my opinion that such a defense is unavailing when once it is shown that the party knew perfectly well the nature of the deed which he was executing."[3]

Similarly, in an action upon a specialty, it was no defense at common law that the consideration for it had failed.[4] Nor that it was given for an illegal or immoral purpose, if this did not appear upon the face of the instrument.[5] How completely ethical considerations were ignored by the common law judges in dealing with

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[1] Y. B 24 Ed. III, f. 24, pl. 1.

[2] 9 See HARV. L. REV. 50, n. 1.

[3] Mason *v.* Ditchbourne, 1 M. & Rob. 460.

[4] See 9 HARV. L. REV. 52.

[5] *Ibid.*

formal contracts is shown by the numerous cases deciding that a covenantor who had paid the full amount due on the covenant, but without taking a release or securing the destruction or cancellation of the instrument, must, nevertheless, pay a second time if the obligee was unconscionable enough to bring an action.[1] In the eye of the common law in all these cases the defendant had given the specialty to the plaintiff intending it to be his: the plaintiff still had it; therefore, let him recover the fruit of his property. In all these cases, however, equity sooner or later gave relief. Equity recognized his common law property right in the specialty, but, because of his unconscionable acquisition or retention of it, commanded him, under pain of imprisonment, to abstain from the exercise of his common law right. Finally, by legislation in England and in nearly all our states, defendants were allowed to plead at common law, as equitable defenses, facts which would have entitled them to a permanent, unconditional injunction in equity. It is to be observed, however, that there is no federal legislation to this effect, so that it is still true that in the federal courts fraud cannot be pleaded in bar of a common law action upon a specialty, the only remedy of the defendant being a bill in equity for an injunction to restrain the action.[2]

The illustrations, thus far considered, of the unmoral character of the early common law exhibit that law in its worst aspect, as an instrument of injustice, as permitting unmeritorious or even culpable plaintiffs to use the machinery of the court as a means of collecting money from blameless defendants.

Let us turn from the sins of commission to some of the sins of omission in the common law, and consider how these defects in the law were cured.

The early common law, as might be supposed, gave fairly adequate remedies for the infringement of the rights of personal safety or personal liberty, and also for the violation of the rights to or in tangible property. But for injuries to one's reputation or damage to one's general welfare or pecuniary condition the relief was of the slightest. Suppose, for example, a person circulated a false story that a tradesman cheated by giving false measure, or that a servant had stolen from his master, in consequence of which the tradesman lost his customers or the servant his place. The common law prior to 1500 gave no redress

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[1] See 9 HARV. L. REV. 54.

[2] *Ibid.* 51.

against the slanderer.[1] If a buyer was induced by the fraudulent representations of the seller to give a large price for a worthless chattel, he could for centuries maintain no action for damages against his deceiver.[2] Not until near the end of the seventeenth century could an innocent man who had been tried and acquitted upon an indictment for murder or other crime obtain compensation for the ignominy and damage to which he had been subjected, although it was clear that the defendant had instigated the criminal prosecution malevolently, and knowing that the plaintiff was innocent.[3] Prior to the reign of Henry VII there was no action for the breach of a promise not under seal, although given for a consideration.[4] Sooner or later the law was changed and the courts allowed an action for damages in all these cases. These innovations were not, however, the result of successive statutes passed to satisfy the popular demand for reform at the time. On the contrary, they were all the product of a few lines in a statute enacted near the end of the thirteenth century, providing that "Whensoever from thenceforth a writ shall be found in the Chancery, and in a like case falling under the same right and requiring a like remedy, no precedent of a writ can be produced, the clerks in Chancery shall agree in forming a new one; lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors."[5] This beneficent statute of Edward I, the origin of all our actions of trespass on the case, has been the great reforming agency in supplying the defects of the common law. Upon this statute is based our whole law of actions for defamation, for malicious prosecution and for deceit, as well as the whole law of assumpsit, which came practically to be the remedy for all modern contracts except contracts under seal. Of the great number of applications of the Statute of Westminster these actions on the case for defamation, deceit, malicious prosecution, and breach of promise, together with the action for nuisances, are the ones which, more than all others, have contributed to the beneficent expansion of the common law. Even after these great innovations there were many grievous defects in the common law scheme of remedies for damage inflicted upon one person by

[1] Y. B. 17 Ed. IV, f. 3, pl. 2; Y. B. 27 Hen. VIII, f. 14, pl. 4.
[2] See 2 HARV. L. REV. 9.
[3] Savile *v.* Roberts, 1 Ld. Ray. 374.
[4] 2 HARV. L. REV. 13.
[5] St. Westminster 2, 13 Ed. I, c. 24.

the reprehensible act of another. Until the time of Lord Holt, one who had suffered from the unauthorized misconduct of a servant acting within the scope of his employment could obtain no compensation from the master.[1] The earliest suggestions of relief against the unauthorized printing by a stranger of the unpublished work of an author are in the second quarter of the eighteenth century.[2] Prior to 1745, no husband whose wife had been induced to leave him by the wrongful persuasion of another had ever recovered compensation from the disturber of the marriage relation.[3] Not until twenty years after the establishment of this school would an action lie against one who wantonly or selfishly induced a person under contract with the plaintiff to break the contract.[4] As recently as 1874 the English court decided for the first time that one who untruthfully disparaged the goods of a tradesman must make compensation for the resulting damage.[5] In all these cases the remedy when finally introduced by the court was in the form of the action on the case, sanctioned by the Statute of Edward I.

Is this statute, now more than six hundred years old, still a living force for the betterment of the common law in England and the United States? There can be but one answer to that question. This statute is a perennial fountain of justice to be drawn upon so long as, in a given jurisdiction, instances may be pointed out in which the common law courts have failed to give a remedy for damage inflicted upon one person by the reprehensible act of another, and the continued absence of a remedy would shock the moral sense of the community.

But with everything done that could be done by this statute, our law as a whole would have been a very imperfect instrument of justice if the system of common law remedies had not been supplemented by the system of equitable remedies. Blackstone has asserted that the common law judges by a liberal interpretation of the Statute of Westminster by means of the action on the case might have done the work of a court of equity. Such an opinion betrays a singular failure to appreciate the fundamental difference between law and equity, namely, that the law acts *in*

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[1] Boson *v.* Sanford, 2 Salk. 440.

[2] Webb *v.* Rose, 3 Sw. 674; 1 Ames Cases in Eq. Jur., 659.

[3] Winsmore *v.* Greenbank, Willes, 577.

[4] Lumley *v.* Gye, 2 E. & B. 216.

[5] Western Co. *v.* Lawes Co., L. R., 9 Ex. 218.

rem, while equity acts *in personam*. The difference between the judgment at law and the decree in equity goes to the root of the whole matter. The law regards chiefly the right of the plaintiff, and gives judgment that he recover the land, debt, or damages, because they are his. Equity lays the stress upon the duty of the defendant, and decrees that he do or refrain from doing a certain thing because he ought to act or forbear. It is because of this emphasis upon the defendant's duty that equity is so much more ethical than law. The difference between the two in this respect appears even in cases of concurrent jurisdiction. The moral standard of the man who commits no breach of contract or tort, or, having committed the one or the other, does his best to restore the *status quo*, is obviously higher than that of the man who breaks his contract or commits a tort and then refuses to do more than make conpensation for his wrong. It is this higher standard of morality that equity enforces wherever the legal remedy of pecuniary compensation would be inadequate, by commanding the defendant by injunction to refrain from the commission of a tort or breach of contract, or by compelling him, after the commission of the one or the other, by means of a mandatory injunction, or a decree for specific performance, so called, to make specific reparation for his wrong.

The ethical character of equitable relief is, of course, most pronounced in cases in which equity gives not merely a better remedy than the law gives, but the only remedy.

The great bulk of the exclusive jurisdiction of equity falls under two heads, Bills for Restitution and Bills for Specific Performance. The object of bills for restitution is to compel the surrender by the defendant of property wrongfully obtained from the plaintiff, or of property properly acquired but improperly retained because of some misconduct after its acquisition. Bills for restitution are very ancient. In the fourteenth and fifteenth century there were bills for the reconveyance of property acquired by fraud or mistake or retained by a defendant after failing to give the stipulated equivalent for the property.[1] Somewhat later we find bills to restrain the enforcement and compel the surrender of specialty contracts obtained fraudulently, illegally, or by mistake, or retained after payment or in spite of failure of consideration.[2] Early in the seventeenth century Lord Ellesmere, in his

[1] 21 HARV. L. REV. 262.

[2] 9 *Ibid.* 51, 52, 54–55.

famous controversy with Lord Coke, established the right to restrain the enforcement of a common law judgment obtained by fraud.[1] In this same century mortgagees were compelled to surrender the mortgaged property notwithstanding the default of the mortgagor and in disregard of the express agreement of the parties, upon payment of the mortgage debt and interest,[2] and to prevent a similar hardship, holders of penal bonds were compelled to give them up without exacting the penalty.[3] In the eighteenth century, without proof of any fraudulent misrepresentation, decrees for reconveyance were made upon the ground of undue influence, growing out of the relations of the parties, as in the case of conveyances by client to attorney, ward to guardian, child to parent and the like. And in the last century grantees, who had acquired property by innocent misrepresentation, were obliged to restore it to their grantors.[4] The relief in these cases consists in undoing the original transaction and restoring the *status quo*, a result, of course, not anticipated by either party at the outset. In other words, equity treated the defendant as holding the property upon a constructive trust for the plaintiff.

On the other hand, bills against express trustees form the staple of the exercise of the exclusive jurisdiction of equity by way of specific performance. Equity began to enforce the performance of uses and trusts soon after 1400.[5]

In giving relief by decrees for restitution against constructive trustees, or by decrees for specific performances against express trustees, equity has acted upon the highly moral principle that no one should, by the wrongful acquisition or retention of a title, unjustly enrich himself at the expense of another.

In the cases thus far considered this doctrine of unjust enrichment was enforced against the original grantee of the property and because of his misconduct in the relation between him and the grantor. But it is a long-established principle that anyone who acquires property from another who, as he knows, holds it subject to a trust or other equity, and also anyone who, without such knowledge, acquires property so held, if he gives no value for it, may be compelled himself to perform the trust or other

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[1] Wilson, Life of James I, 94, 95; 2 Campbell, Lives of Lord Chancellors, 241.
[2] 1 Spence, Eq. Jur., 602–603.
[3] *Ibid.* 629.
[4] Redgrave *v.* Hurd, 20 Ch. D. 1.
[5] 21 HARV. L. REV. 265.

equitable obligation. It is true there is no direct relation between the equitable claimant and the buyer with notice or the donee without notice. But if the one could knowingly acquire, or the other knowingly keep, the property free from the trust or other equity, he would be profiting unconscionably at the expense of the *cestui que trust* or other equitable claimant. These applications of the doctrine of unjust enrichment are good illustrations of the highly moral quality of equity jurisdiction. They are almost unknown to the Roman law, and are but imperfectly recognized in modern continental law.

There is another doctrine of equity which has only a limited operation in countries whose law is based on the Roman law, the doctrine that no one shall make a profit from the violation of an equitable duty, even though he is ready to make full compensation to him whose equitable right he has infringed. A trustee, for example, of land worth $5,000 in breach of trust conveys it to a purchaser for value without notice of the trust, receiving in exchange fifty shares of corporate stock. The shares appreciate and become worth $10,000, while the land depreciates to $3,000. The delinquent trustee may be compelled to surrender the shares to the *cestui que trust*, although the latter thereby gets $7,000 more than he would have had if there had been no breach of trust. If the shares had depreciated and the land appreciated, the *cestui que trust* would be entitled to the increased value of the land. It is a wholesome principle that whatever the misconducting trustee wins he wins for his beneficiary, and whatever he loses he loses for himself.

The equitable rules which prohibit a fiduciary, while in the performance of his fiduciary duty, from competing in any way with the interest of his beneficiary, and permit dealings between them only upon clear evidence of the good faith of the fiduciary, and of a complete disclosure of all his knowledge as to the matters entrusted to him, and in fact the whole law of equity as to fiduciaries, enforce a moral standard considerably in advance of that of the average business man. Enough has been said to make plain that much as our law owes to the action on the case for its ethical quality, it is to the principles of the court of equity, acting upon the conscience of the defendants and compelling them by decrees of restitution and specific performance to do what in justice and right they ought to do, that we must look to justify our belief that the English and American systems of

law, however imperfect, are further on the road to perfection than those of other countries.

In considering the possibility of further improvements of the law we must recognize at the outset that there are some permanent limitations upon the enforcement in the courts of duties whose performance is required in the forum of morals.

On grounds of public policy there are and always will be, on the one hand, many cases in which persons damaged may recover compensation from others whose conduct was morally blameless, and, on the other hand, many cases in which persons damaged cannot obtain compensation even from those whose conduct was morally most reprehensible.

Instances of unsuccessful actions against persons free from fault readily suggest themselves. The master, who has used all possible care in the selection of his servants, is liable for damage by them when acting within the scope of their employment, although they carelessly or even wilfully disregard his instructions. The business is carried on for the master's benefit, and it is thought to be expedient that he, rather than a stranger, should take the risk of the servant's misconduct. One keeps fierce, wild animals at his peril, and also domestic animals, after knowledge that they are dangerous. By legislation, indeed, in several states, one who keeps a dog must make three-fold compensation, in one state ten-fold compensation, for damage done by the dog, without proof of the keeper's knowledge of its vicious quality. The sheep farmers must be encouraged, even if some innocent persons have to pay dearly for the luxury of keeping a dog. A Massachusetts bank was entered by burglars who carried off and put into circulation a large quantity of bank notes which had been printed but never issued by the bank. The bank had to pay these notes. The bank must safeguard the notes it prints at its peril, to prevent the possibility of a widespreading mischief to the general public.

The results in these cases are much less disturbing to one's sense of fairness than in those in which the innocent victims of the unrighteous are allowed no redress. For example, a will is found after a man's death giving all his property to his brother. In the same box with the will is a letter, not referred to in the will, addressed to the brother, telling him that he is to hold the property in trust for their sister. The brother insists upon keeping the property for himself. The court is powerless to help the

defrauded sister. The rule that the intention of the testator must be found exclusively in the duly-witnessed document, in view of the danger of perjury and forgery, is the best security for giving effect to the true will of the generality of testators. The defenses of infancy, statute of frauds, statute of limitations, or that a promise was gratuitous are only too often dishonorable defenses, but their abolition would probably increase rather than diminish injustice. An English judge said from the bench: "You are a harpy, preying on the vitals of the poor." The words were false and spoken for the sole purpose of injuring the person addressed. The latter could maintain no action against the judge. It is believed to be for the public interest that no judge should be called to account in a civil action for words spoken while on the bench.

The law is utilitarian. It exists for the realization of the reasonable needs of the community. If the interest of an individual runs counter to this chief object of the law, it must be sacrificed. That is why, in the cases just considered and others that will occur to you, the innocent suffer and the wicked go unpunished.

But unless exempted from liability by considerations of enlightened public policy, I can see no reason why he who has by his act wilfully caused damage to another should not in all cases make either specific reparation or pecuniary compensation to his victim.

Has this principle become a part of our law? Let us consider a few concrete cases. A man kills his daughter in order to inherit her real estate. Under the statute the land descends to him as her heir. May he keep it? It seems clear that equity should compel him to surrender the property. As it is impossible to make specific reparation to the deceased, he should be treated as a constructive trustee for those who represent her, that is, her heirs, the murderer being counted out in determining who are the heirs. But in several states the murderer is allowed to keep the fruits of his crime.[1]

A handsome, modest young lady is photographed without her consent and her likeness is reproduced and sent broadcast through the land as part of an advertising label with the legend, "The Flower of the Family," placed upon thousands of barrels of

[1] 36 Am. L. Reg. and Rev. 225; Wellner *v.* Eckstein, 117 N. W. 830 (Minn., 1908. Two judges dissenting). In New York the rule is the other way.

flour. Here, too, the courts are divided as to whether she should have relief. It being well settled and properly settled that the recipient of a letter commits a tort if he publishes it without the consent of the writer, there should be little difficulty in preventing the greater invasion of privacy in using the portrait of a modest girl as an advertising medium. Suppose, again, that the owner of land sinks a well, not in order to get water for himself, but solely for the purpose of draining his neighbor's spring, or that he erects an abnormally high fence on his own land, but near the boundary, not for any advantage of his own, but merely to darken his neighbor's windows or to obstruct his view. Is the landowner responsible to his neighbor for the damage arising from such malevolent conduct? In thirteen of our states he must make compensation for malevolently draining the neighbor's spring. In two other states the opposite has been decided. In four states one who erects a spite fence must pay for the damage to the neighbor. In six others he incurs no liability. Six states have passed special statutes giving an action for building such a fence. In Germany and France and in other continental countries an action is allowed against the landowner in both cases.

The principle I have suggested would allow relief in all of these cases, and its adoption by the courts is fairly justified by the rules of equity and the Statute of Edward I. This principle is very neatly expressed in the new German Code: "Any act done wilfully by means of which damage is done to another in a manner *contra bonos mores* is an unlawful act."

To put quite a different case, should statutes be passed giving compensation by the state to an innocent man for an unmerited conviction and punishment? The state, it is true, has merely done its duty in carrying through the prosecution. But the prosecution was made for the benefit of the community, and is it not just that the community rather than an innocent member of it should pay for its mistakes? By recent legislation Germany has provided compensation for the innocent sufferer in such cases.

In these cases in which it is suggested that the person damaged ought to recover compensation, the damage was caused by the wilful act of the party to be charged. It remains to consider whether the law should ever go so far as to give compensation or to inflict punishment for damage which would not have happened but for the wilful inaction of another. I exclude cases in which, by reason of

some relation between the parties like that of father and child, nurse and invalid, master and servant and others, there is a recognized legal duty to act. In the case supposed the only relation between the parties is that both are human beings. As I am walking over a bridge a man falls into the water. He cannot swim and calls for help. I am strong and a good swimmer, or, if you please, there is a rope on the bridge, and I might easily throw him an end and pull him ashore. I neither jump in nor throw him the rope, but see him drown. Or, again, I see a child on the railroad track too young to appreciate the danger of the approaching train. I might easily save the child, but do nothing, and the child, though it lives, loses both legs. Am I guilty of a crime, and must I make compensation to the widow and children of the man drowned and to the wounded child? Macaulay, in commenting upon his Indian Criminal Code, puts the case of a surgeon refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that, if it were not performed, the person who required it would die.

We may suppose again that the situation of imminent danger of death was created by the act, but the innocent act, of the person who refuses to prevent the death. The man, for example, whose eye was penetrated by the glancing shot of the careful pheasant hunter, stunned by the shot, fell face downward into a shallow pool by which he was standing. The hunter might easily save him, but lets him drown.

In the first three illustrations, however revolting the conduct of the man who declined to interfere, he was in no way responsible for the perilous situation, he did not increase the peril, he took away nothing from the person in jeopardy, he simply failed to confer a benefit upon a stranger. As the law stands today there would be no legal liability, either civilly or criminally, in any of these cases. The law does not compel active benevolence between man and man. It is left to one's conscience whether he shall be the good Samaritan or not.

But ought the law to remain in this condition? Of course any statutory duty to be benevolent would have to be exceptional. The practical difficulty in such legislation would be in drawing the line. But that difficulty has continually to be faced in the law. We should all be better satisfied if the man who refuses to throw a rope to a drowning man or to save a helpless child on the railroad

track could be punished and be made to compensate the widow of the man drowned and the wounded child. We should not think it advisable to penalize the surgeon who refused to make the journey. These illustrations suggest a possible working rule. One who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death. The case of the drowning of the man shot by the hunter differs from the others in that the hunter, although he acted innocently, did bring about the dangerous situation. Here, too, the lawyer who should try to charge the hunter would lead a forlorn hope. But it seems to me that he could make out a strong case against the hunter on common law grounds. By the early law, as we have seen, he would have been liable simply because he shot the other. In modern times the courts have admitted as an affirmative defense the fact that he was not negligent. May not the same courts refuse to allow the defense, if the defendant did not use reasonable means to prevent a calamity after creating the threatening situation? Be that as it may, it is hard to see why such a rule should not be declared by statute, if not by the courts.

It is obvious that the spirit of reform which during the last six hundred years has been bringing our system of law more and more into harmony with moral principles has not yet achieved its perfect work. It is worth while to realize the great ethical advance of the English law in the past, if only as an encouragement to effort for future improvement. In this work of the future there is an admirable field for the law professor. The professor has, while the judge and the practicing lawyer have not, the time for systematic and comprehensive study and for becoming familiar with the decisions and legislation of other countries. This systematic study and the knowledge of what is going on in other countries are indispensable if we would make our system of law the best possible instrument of justice. The training of students must always be the chief object of the law school, but this work should be supplemented by solid contributions of their professors to the improvement of the law.

James Barr Ames.